

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINDA GREEN**

Claimant

VS.

**THE FLESH COMPANY**

Respondent

AND

**CINCINNATI CASUALTY COMPANY**

Insurance Carrier

Docket No. **1,053,487**

**ORDER**

Respondent and its insurance carrier (respondent) request review of the December 27, 2013, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on April 23, 2014, in Wichita, Kansas.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopts the stipulations listed in the Award.<sup>1</sup>

**ISSUES**

The ALJ found claimant sustained personal injury by accident arising out of and in the course of her employment on September 30, 2010, and that respondent was given

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<sup>1</sup> The parties stipulated that the April 13, 2011, preliminary hearing transcript, and the non-medical exhibits from that proceeding, are part of the record.

“adequate”<sup>2</sup> notice of the accident. The ALJ also found claimant sustained a 19% whole body permanent functional impairment, encompassing the cervical and lumbar spine, and a 79.5% work disability, comprised of a 100% wage loss and a 59% task loss.

Respondent initially raised six issues. However, at oral argument counsel for both parties agreed the Board need only address two issues: (1) whether claimant sustained personal injury by accident arising out of and in the course of her employment and (2) whether respondent was given timely notice of the accident.

Counsel also agreed at oral argument that if the Board finds the claim compensable, the undisputed evidence supports the Judge’s findings on functional impairment, task loss, wage loss and work disability.

Claimant argues the Award should be affirmed.

This claim was previously before the Board on review of Judge Klein’s December 9, 2011, preliminary hearing Order. Then Board Member David A. Shufelt entered an Order dated February 17, 2012, reversing the ALJ, finding respondent was not given timely notice, and concluding compensation should be denied.

The issues for Board determination are:

1. Did claimant sustain personal injury by accident arising out of and in the course of her employment?
2. Was respondent given timely notice of the accident?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant was employed by respondent, a printing company, as a human resources manager at respondent’s Parsons, Kansas, facility. One of claimant’s job duties was to restock supplies needed in the kitchen used by respondent’s employees. The supplies were purchased by claimant with respondent’s credit card at a Sam’s Club in Joplin, Missouri. The purchases were made with respondent’s permission while claimant was “on the clock.”<sup>3</sup> Claimant’s trips to Sam’s Club were made using her personal vehicle with gasoline she purchased.

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<sup>2</sup> ALJ Award at 3.

<sup>3</sup> P.H. Trans. at 6.

Claimant alleged personal injury by accident on Thursday, September 30, 2010,<sup>4</sup> when she was on a trip to Sam's Club to make purchases for respondent.<sup>5</sup> Claimant described the accident as follows:

After gathering all the supplies and loading them on the cart, checking out, when I went to load them in my car, as I was lifting the sugar canisters, two or three high, and bending over and putting them into my trunk is when I felt the first pain in my back on the left side.<sup>6</sup>

Claimant testified the sugar canisters weighed approximately one pound each and there were eight canisters in a pack. She claimed injury when she was bent over, lifting two or three packs and placing the packs into the trunk of her car. Each pack was 12-18 inches long and 8 inches high. Claimant finished loading the rest of the supplies into her car.

At her evidentiary deposition, claimant testified she sustained additional injury when she unloaded the supplies at respondent's facility the day after the accident, Friday, October 1, 2010. At the preliminary hearing, claimant testified she unloaded the supplies two days after September 30, 2010, which was Saturday, October 2, 2010, a day claimant did not work. She testified that as she unloaded the supplies, she experienced pain on the left side of her neck and her left shoulder down into her lower back. Claimant testified: "When I unloaded the supplies, as I was carrying them in, it worsened, became very painful. As I had to unload my vehicle and bring them in and stack them in the cabinet, climb upstairs."<sup>7</sup>

At her evidentiary deposition, claimant testified she provided notice of her accident to Donnie Williams, respondent's production floor supervisor, and asked him to assist her in unloading the supplies. Claimant testified at the preliminary hearing:

Q. Did you describe to [Donnie Williams] how you hurt your back at Sam's . . . ?

A. Yes, my back was sore and I needed help unloading.

Q. And did he send the help?

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<sup>4</sup> At the April 13, 2011, preliminary hearing, claimant testified she was injured between September 19, 2010, and mid-October 2010. P.H. Trans. at 28.

<sup>5</sup> A receipt from Sam's Club dated September 30, 2010, reflected claimant's purchase of kitchen supplies on that date. P.H. Trans., Resp. Ex. 2.

<sup>6</sup> P.H. Trans. at 9.

<sup>7</sup> *Id.* at 14.

A. He said he would but then he forgot and did not send anybody out there.<sup>8</sup>

At the preliminary hearing, claimant testified she provided notice of her accident to Barbara Eaton, Lisa Hennen and Lori Bowman, and nobody else.<sup>9</sup> Ms. Hennen and Ms. Bowman were not supervisors.

Claimant testified she reported her work injury to Barbara Eaton, respondent's human resources director and claimant's direct supervisor, on the same day claimant unloaded the supplies. Claimant stated she did not complete an accident report because that was her supervisor's responsibility under respondent's standard procedure. Claimant testified respondent had an employee accident report that was to be provided by the supervisor to the injured employee for the latter to complete.<sup>10</sup>

Barbara Eaton testified she first became aware of claimant's injury when she received a letter from claimant's attorney dated November 17, 2010. She admitted claimant and she may have talked about claimant's back pain, but did not discuss any work-related back pain.<sup>11</sup>

Lori Bowman, respondent's accounts payable clerk, testified she had no conversations with claimant regarding any work-related back injury.

Lisa Hennen, respondent's invoicing clerk, denied she had any conversations with claimant regarding her injury.

Donnie Williams, a production supervisor but not claimant's direct supervisor, testified he did not recall claimant requesting assistance on or near September 30, 2010. Mr. Williams testified claimant did not notify him of any work-related injury.

Barbara Higgins and Cara Mead, both former employees of respondent, testified respondent terminated their employment due to their pursuit of workers compensation claims. Helen DeWitt testified to the same effect.

Respondent terminated claimant's employment on October 29, 2010. On that date, respondent offered her a severance package which required claimant to sign a document containing a general release and waiver of claims, including workers compensation claims. Claimant refused to execute the waiver unless the workers compensation language was

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<sup>8</sup> *Id.*

<sup>9</sup> Lori Bowman is also referred to in the record as Lori Campmier.

<sup>10</sup> P.H. Trans. at 35-36.

<sup>11</sup> *Id.* at 45-46.

deleted from the instrument. Respondent was unwilling to remove such language and the severance package was withdrawn.<sup>12</sup> Claimant testified that when she was presented with the severance package, she did not discuss her accident.<sup>13</sup>

Claimant first sought medical treatment for her injury with her primary care physician, Dr. Lisa Salvador, on November 19, 2010. Dr. Salvador's records are not in evidence. Claimant testified she told Dr. Salvador she was injured lifting at work between late September 2010 to mid-October 2010.<sup>14</sup> Apparently, claimant was prescribed medication and physical therapy by Dr. Salvador, although it is unclear from the record whether claimant received such treatment. Claimant testified she received no authorized medical treatment.<sup>15</sup>

Claimant was seen at some point by Dr. Kevin Mosier, whose records are also not in evidence. Dr. Mosier ordered lumbar and cervical spine MRI scans, but there is no indication he provided treatment.

Dr. Edward J. Prostic, a board-certified orthopedic surgeon, evaluated claimant at the request of her counsel on November 29, 2010. Claimant told Dr. Prostic she was injured on "October 19, 2010 through October 21, 2010" from lifting supplies weighing up to 30 pounds and placing them in an over-the-shoulder position.<sup>16</sup> Dr. Prostic found claimant had mild crepitus in the left shoulder and mild tenderness at the lumbosacral junction. Left shoulder x-rays revealed "fairly severe degeneration of the tuberosities."<sup>17</sup> Lumbar spine x-rays showed a mild anterior compression deformity at T12, L1 and L3 and disk space narrowing at L5-S1. Dr. Prostic diagnosed left rotator cuff tendonitis, mild thoracic outlet syndrome, cubital tunnel syndrome, carpal tunnel syndrome and a suspected disk protrusion at L4-5.

Dr. Prostic opined claimant's work caused or permanently aggravated claimant's injuries. Dr. Prostic recommended anti-inflammatory medications, physical therapy for the left shoulder and exercises for the thoracic outlet syndrome. An EMG was recommended if claimant did not receive satisfactory relief from the prescribed treatment. The doctor restricted claimant to light to medium activity, no lifting greater than 30 pounds

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<sup>12</sup> *Id.* at 23-24.

<sup>13</sup> *Id.* at 36.

<sup>14</sup> *Id.* at 25, 28.

<sup>15</sup> Claimant's Depo. at 37-38.

<sup>16</sup> Prostic Depo., Ex. 1 at 1; Claimant's Depo. at 34.

<sup>17</sup> Prostic Depo., Ex. 1 at 3.

occasionally, limited use of her left hand above shoulder height, avoiding repetitious forceful gripping with the left hand and avoiding frequent bending or twisting at the waist.

Although an EMG report is not in evidence, according to Dr. Prostic, that study was conducted and revealed claimant had left carpal tunnel syndrome, but not cervical radiculopathy.

On April 2, 2012, claimant was again examined by Dr. Prostic. He reviewed MRI scans of the cervical and lumbar spine, which revealed severe left neuroforaminal stenosis at C6-7. The doctor diagnosed cervical and lumbar radiculopathy, left rotator cuff dysfunction and left carpal tunnel syndrome. Dr. Prostic opined claimant's injuries were caused or permanently aggravated by her work-related activities on or about September 30, 2010, and October 1, 2010. The doctor imposed permanent restrictions of: limit duties to light to medium work; no more than occasional lifting of 30 pounds from knees to waist and 20 pounds from waist to shoulder; minimal activities below knee height or above shoulder height; and avoid frequent bending and twisting at the waist, forceful pushing or pulling and more than minimal use of vibrating equipment and working in captive positions.

Based on the *AMA Guides*,<sup>18</sup> Dr. Prostic opined claimant sustained a 10% permanent functional impairment to the whole body due to her cervical injury and a 10% permanent whole person functional impairment for the lumbar spine. In Dr. Prostic's opinion, claimant also sustained a 15% permanent functional impairment to the left upper extremity at the level of the shoulder for rotator cuff dysfunction and left carpal tunnel syndrome. Using the *Guides*' conversion tables and Combined Values Chart, Dr. Prostic opined claimant sustained an aggregate of 26% permanent functional impairment to the whole body.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Karen Crist Terrill, a vocational rehabilitation consultant, and concluded claimant could no longer perform 27 of the 46 tasks for a 59% task loss.

Ms. Terrill interviewed claimant on April 17, 2012. She identified 46 non-duplicative work tasks claimant performed in the 15 years prior to her accidental injury. Claimant was not working at the time of the interview and accordingly had a 100% wage loss.

Claimant's current complaints are lower back, neck, and left shoulder pain and numbness in her fingers and toes on the left side. After respondent terminated claimant's employment, she filed for and received unemployment compensation at \$330 per week

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<sup>18</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

through February 2013. Claimant testified she was ready, willing and able to work with some limitations. Claimant has engaged in no gainful employment since October 29, 2010.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2010 Supp. 44-501(a) provides in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

In order to determine whether notice was timely, the date of accident must first be determined. In this claim, precisely when claimant alleges she sustained accidental injury is unclear to say the least. For purposes of this Order, the Board assumes that if claimant sustained personal injury by accident arising out of and in the course of her employment with respondent, the date of accident was September 30, 2010.

The Board reverses the Award and finds the preponderance of the credible evidence does not establish that respondent was given timely notice of claimant's accidental injury. Compensation must therefore be denied.

The findings of fact and conclusions of law contained in the February 17, 2012, Order of former Board Member David A. Shufelt are fully supported by a preponderance of the credible evidence and are adopted by the Board as though fully set forth herein, as supplemented by, and consistent with, the findings set forth above.

In light of the Board's finding that respondent was not given timely notice pursuant to K.S.A. 44-520, the remaining issue is moot and will not be specifically addressed in this Order.

Claimant testified she notified two supervisors – Barbara Eaton and Donnie Williams – of her injuries on the date she unloaded the supplies she purchased for respondent at the Joplin, Missouri, Sam's Club. Claimant also testified she asked Mr. Williams to arrange for her to receive assistance unloading the supplies. Both Ms. Eaton and Mr. Williams contradicted claimant's testimony regarding notice. Moreover, the evidence establishes claimant, as human resources manager at respondent's Parsons, Kansas, facility, knew that respondent had an incident report form which was to be completed by the employee alleging a workplace injury. Despite that knowledge, claimant did not complete the required form.

Claimant testified she also told two nonsupervisory co-employees – Lori Bowman and Lisa Hennen – about her accidental injury, but both of the co-employees contradicted claimant's testimony.

The Board's jurisdiction is de novo on all issues raised before the ALJ. The ALJ found claimant gave "adequate" notice, but the question is not whether notice was adequate. Rather, the issue to be addressed is whether respondent was given notice within the 10-day period required by the statute. No issue has been raised about the "just cause" provision of the statute which can lengthen the 10 days up to 75 days, nor is there any contention that respondent otherwise had actual knowledge of the accident.

In finding notice was adequate, the ALJ found "particularly persuasive that the claimant was asked to sign a severance agreement waiving any workers compensation claims, and that she refused to agree to the terms of the agreement based on that portion of the agreement."<sup>19</sup> Clearly, on or about October 29, 2010, respondent offered claimant a severance package that required her to sign a waiver and a general release of all claims, including workers compensation claims. Claimant refused to sign the document unless the workers compensation language was omitted from the waiver/release and respondent withdrew the severance proposal and terminated claimant's employment.

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<sup>19</sup> ALJ Award at 3.

Although the release and waiver was of questionable validity to conclude claimant's workers compensation claim,<sup>20</sup> the Board sees little, if any, relevance the proposed waiver and release has to the issue of whether claimant provided respondent with timely notice.

The Board finds that claimant did not satisfy her burden to prove respondent was given timely notice of claimant's alleged September 30, 2010, accident and that the Award is accordingly reversed and compensation is denied. The remaining issue is moot.

#### **CONCLUSIONS OF LAW**

1. Respondent was not given timely notice of claimant's alleged September 30, 2010, accident and compensation is therefore denied.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>21</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

#### **AWARD**

**WHEREFORE**, it is the Board's decision that the Award of ALJ Thomas Klein dated December 27, 2013, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>20</sup> See K.A.R. 51-21-1 and 51-3-1.

<sup>21</sup> K.S.A. 2013 Supp. 44-555c(j).

c: William L. Phalen, Attorney for Claimant  
wlp@wlphalen.com

Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
cmccurdy@wallacesaunders.com

Honorable Thomas Klein, ALJ